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ALEXANDER L. STEVAS,
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No. 82-1631

IN THE

Supreme Court of the United States

October Term, 1982

POTAMKIN CADILLAC CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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There are certain errors and misstatements in the government's memorandum in opposition which must be corrected.

It is at all times to be pointed out to the Court that there was never a trial of this matter.

This matter revolves around a motion for summary judgment, and the rules of evidence and the method of proof employed in summary judgment proceedings are not the same as at trial. All that must be shown to defeat a motion for summary judgment is that an issue exists, not the evidence which conclusively proves or supports the argument.

1. The government has at all times acted improperly with regard to the statement that Petitioner's counsel made, that he did not know about the filing of the report. The government knew full well that this statement referred to the original filing of the report, and not to the filing by Marvin Schell. In fact, the answer filed in the case, and the letter submitting the copy of the report, which the government accepts as the first filing, clearly indicate that the report had been filed at an earlier time. The business record rule, of course, applies to all of these proceedings.

2. There is no showing in the record to indicate that Petitioner's counsel called a wrong telephone number. The telephone number used to reach Marvin Schell was correct, but Marvin Schell did not answer, as he was confined to a mental institution. Counsel had no way of knowing this at the time the telephone calls were made. Counsel only learned of Marvin Schell's confinement to a mental institution one day prior to the oral argument before the Second Circuit.

3. The present case is not an instance where the government sought to collect a tax or monies generally due to it, nor is it a case involving any attempt to delay the government from collecting monies rightfully due to it. It is a case where a business organization is attempting to defend itself against an unusually heavy penalty for a slight misdeed, the alleged failure to file a report. The government has made no showing as to the necessity and value of the report at issue, or how the government was

injured if in fact the report was not promptly filed. Further, the government has made no showing as to the steps it takes to ensure that such reports are properly collected and carefully preserved.

4. Petitioner's counsel did not have the wisdom to locate Marvin Schell when there was no answer at his correct telephone number, and he was not responding to the call because he was away in a mental institution, and did not inform anyone that he was in a mental institution. The doctor-patient privilege makes it exceedingly difficult to discover someone who checks himself into a mental institution without giving any notice to other parties. Considering the number of mental institutions in the United States, it would have been impossible, as a practical matter, to have located Marvin Schell. Further, the undue haste with which the Court acted in this matter is one of the causes of the problem.

5. The Petitioner herein is a company that does business in the United States, pays very substantial taxes to the United States government, and gives employment to in excess of three hundred people, and its existence is certainly beneficial to the community. Therefore, the Petitioner should not suffer the type of sanctions which it did.

The automobile industry is in great difficulty. Even though the government in its brief shows a very high sales figure, it does not show a profit figure. If automobile dealers in America are to be harassed in this manner by the government, undoubtedly, great harm will come to the republic by way of unemployment and all its accompanying evils.

6. The Petitioner in this matter did not seek to harm any party, and no party has been harmed by Petitioner's action. The government obtained

a windfall of \$40,000, and the judgment was at all times covered by a bond so that the government would collect its money, with interest. Nothing was done here to vex or delay the government. The actions of the Petitioner herein were the actions of a businessman attempting to prevent an unnecessary loss of its funds. Businessmen and business organizations have a constitutional right to protect their property and to address arguments to the Court.

7. In the interest of judicial economy, a motion was in fact made to the United States Court of Appeals for the Second Circuit to combine both appeals, so as to save the time and energy of all parties. That motion was denied on August 27, 1982.

8. The imposition of costs against counsel is totally without cause. It will serve no purpose but to cast a chill on any future

counsel's resolve to bring an appeal from any decision which counsel may believe is wrong. Reasonable parties may differ, but the differences in the instant case are not wild or insane. They are differences which are legitimately held by the parties, and which should be addressed to a tribunal without fear that counsel will be punished. In the early history of the United States, when the American Revolution was conceived, similar tactics were used against Peter Zenger, the printer of the newspaper that attacked the British government. He was disbarred and also suffered sanctions because of unpopular views. The federal courts should never lend their authority to such despotic practices. There may exist cases where there are reasons for sanctions, but this present case is certainly not among them. In fact, in the oral argument of the original motion, the judges themselves questioned how

in good faith the government could ask for costs, when it was receiving a \$40,000 windfall.

What is at issue in the present case is a motion for summary judgment, and not a trial verdict. Summary judgment is a drastic remedy, and, for that reason, all that must be shown to defeat it is the existence of a controversy, and not the full dimensions or the outcome of the controversy. In view of the fact that evidence of a highly probative nature was discovered a very short time after the argument of the motion, the motion for 60(b)(2) relief should have been granted, in the interest of justice. The American business community is as much entitled to justice as any other group. The benefits that America receives from its business community are equal to, and perhaps

more tangible and direct, than those received by other groups who have obtained far greater leniency from the courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

PHILIP I. BEANE

Counsel for Petitioner

June 1983